

1 Pamela M. Egan, WSBA No. 54736
2 POTOMAC LAW GROUP PLLC
3 1905 7th Ave. W
4 Seattle, WA 98119
5 Telephone: (415) 297-0132
6 Email: pegan@potomacclaw.com
7 *Counsel for the Chapter 7 Trustee, Plaintiff*

8 **UNITED STATES BANKRUPTCY COURT**
9 **EASTERN DISTRICT OF WASHINGTON**

10 In re:

11 GIGA WATT, Inc., a Washington
12 corporation,

13 Debtor.

Case No. 18-03197 FPC 11

The Honorable Frederick P. Corbit

Chapter 7

14 MARK D. WALDRON, AS
15 CHAPTER 7 TRUSTEE,

16 Plaintiff,

17 vs.

18 PERKINS COIE LLP, *et. al*,

19 Defendants.

Adv. Pro. No. 20-80031-FPC

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
ORDER GRANTING
WITHDRAWAL OF THE
DISTRICT COURT'S
REFERENCE PURSUANT TO
28 U.S.C. § 157**

20 Plaintiff's Opposition to Motion for
21 Order Granting Withdrawal of the
22 District Court's Reference, etc.

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1 Mark D. Waldron, in his capacity as the Chapter 7 Trustee (the “Trustee” or
2 “Plaintiff”) hereby respectfully submit his opposition (the “Opposition”) to the
3 *Motion for Order Granting Withdrawal of the District Court’s Reference, etc.* (the
4 “Motion”) [AP Doc 27], filed by Perkins Coie, LLP and Lowell Ness (collectively,
5 “Perkins Coie”).

6 I. BACKGROUND

7 Giga Watt, Inc. (“Giga Watt”) commenced this case (the “Bankruptcy
8 Case”) on November 19, 2018, through the filing of a voluntary petition for relief
9 (the “Petition”) pursuant to 28 U.S.C. §§ 101 to 1532 (the “Bankruptcy Code”).

10 The Court approved Mark Waldron’s appointment as Chapter 11 Trustee on
11 January 24, 2019. [Main Case ECF No. 146.]

12 On February 19, 2019, Andrey Kuzenny (“Kuzenny”), a defendant, herein,
13 filed his proof of claim assigned Claim No. 133 seeking payment on a general
14 unsecured basis in the amount of \$2,014,593.85. Mr. Kuzenny also signed the
15 Petition and the Schedules of Assets and Liabilities and Statement of Financial
16 Affairs, which were inaccurate and incomplete.

17 On February 19, 2019, Giga Watt Pte. Ltd. (“GW Singapore”) filed its proof
18 of claim, assigned Claim No. 135, alleging that Giga Watt, the debtor herein, is
19 indebted to GW Singapore in the amount of \$26,887,859.79 for a loan that GW
20 Singapore provided to Giga Watt. GW Singapore intended to raise capital from an
21 Initial Coin Offering (the “ICO”) that it conducted in 2017 and to lend that money
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1 to Giga Watt at 10% annual, simple interest. No payments were due until
2 December 31, 2020.

3 Under this arrangement, GW Singapore would not have to lend its own
4 money to Giga Watt. Instead, it would lend the ICO proceeds to Giga Watt. If Giga
5 Watt sold the facilities for more than the debt, then the profit would inure to Giga
6 Watt's shareholders. As alleged in the Complaint, Perkins Coie served as the
7 escrow for the ICO and was charged with holding the token sale proceeds until
8 Giga Watt had built the requisite power.

9 On September 30, 2020, the case converted from one under Chapter 11 to
10 one under Chapter 7 of the Bankruptcy Code. [Main Case ECF No. 744.] Mr.
11 Waldron was appointed Chapter 7 Trustee pursuant to the *Appointment of Trustee*,
12 dated September 30, 2020. [Main Case ECF No. 745.]

13 On November 18, 2020, the Trustee commenced the above-captioned
14 adversary proceeding by filing a complaint against Perkins Coie for breach of its
15 fiduciary duty Giga Watt and aiding and abetting GW Singapore's breach of
16 fiduciary duty to Giga Watt. Perkins Coie breached its fiduciary duty and aided
17 and abetted GW Singapore's breach of fiduciary duty by allowing Andrey
18 Kuzenny and/or GW Singapore to misappropriate approximately \$10.8 million
19 from the escrow that Perkins Coie was holding in trust for the benefit of the Giga
20 Watt Project.

1 On December 15, 2020, Jun Dam, representing a purported class of token
2 holders, filed a complaint against Perkins Coie in the United States District Court
3 for the Eastern District of Washington, Case No. 2:20-cv-00464 (the “TH Class
4 Action”). As stated on the record at the Status Conference held on January 12,
5 2021, the plaintiffs in that case intend to file a motion to refer the TH Class Action
6 to the Bankruptcy Court. In the above-captioned bankruptcy case, Jun Dam and the
7 purported token holder class members have asserted claims arising from their
8 purchase of tokens in the ICO. The same is true in the TH Class Action where they
9 are suing Perkins Coie for treating the ICO escrow as if it were a client trust
10 account and for allowing GW Singapore and/or Kuzenny to misappropriate half
11 the token proceeds raised in the ICO.

12 In the TH Class Action and the proofs of claim, the token holders are
13 asserting claims against both Giga Watt and Perkins Coie for claims arising from
14 their purchase of tokens. As such they seek damages arising from the failure of the
15 Giga Watt Project and the failure of the escrow. These two failures are inextricably
16 intertwined as the failure of the escrow led inexorably to Giga Watt’s failure.

17 On the evening before the Trustee’s deadline to submit this Opposition,
18 Perkins Coie filed a late Answer which aims to take the offensive. The Answer
19 alleges that Giga Watt was in a better position than Perkins Coie to know whether
20 or not Perkins Coie should release funds. This is rich given that Perkins Coie
21 refused to give any information to either Giga Watt or the Trustee about the escrow
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1 until the Court issued a Protective Order. Besides, when GW Singapore directed
2 Perkins Coie to send escrow funds to Giga Watt, the transfers matched the amount
3 of power that Giga Watt had. Notwithstanding, Perkins Coie also affirmatively
4 alleges:

5 *[T]he plaintiff is liable to Perkins for any damages caused to Perkins*
6 *by Giga Watt Pte., Ltd.'s conduct . . . In particular, if Giga Watt Pte.,*
7 *Ltd., wrongfully instructed Perkins to disburse funds from its IOLTA*
8 *Trust Account, then as Giga Watt Pte., Ltd.'s partner, plaintiff is*
liable to Perkins for any and all damages incurred by Perkins as a
result of following the instructions of Giga Watt. Pte. Ld.

9 Answer, ¶ 2, p. 14, lines 14-21. As set forth below, Perkins Coie's affirmative
10 demand subjects Perkins Coie to the equitable jurisdiction of the Bankruptcy Court
11 and forfeits any right to a jury trial that Perkins Coie may have had. Further, by
12 asking for damages arising from the facts alleged in the Complaint, Perkins Coie
13 invoked the core jurisdiction of this Court. 28 U.S.C. § 157(b)(2)(B).

14 In its Answer, Perkins Coie also raises the core issue of how the estate has
15 been administered, alleging:

16 *[R]ather than defending any theoretical or alleged liability on its part,*
17 *plaintiff has instead created theories of its own liability in order to*
18 *allege the claims herein, not to reimburse the victims of the alleged*
scheme, but to create a fund to pay the Trustee and its representatives.
This is improper.

19 Answer, para. 12, lines 13-19. The Bankruptcy Court has core jurisdiction over
20 how the Trustee and his representatives have administered the estate. 28 U.S.C. §
21 157(b)(2)(A).

1 The Answer also raises potentially dispositive legal defenses, such as failure
2 to state a claim and lack of standing. These defenses could dispose of the case
3 without any trial, as set forth below.

4 II. POINTS AND AUTHORITIES

5 District courts have original jurisdiction of “all civil proceedings arising
6 under title 11 of the United States Code or arising in or related to cases under title
7 11 of the United States Code. 28 U.S.C. § 1334(b). In the Ninth Circuit, a
8 proceeding is related to a case under Title 11 if “*the outcome of the proceeding*
9 *could conceivably have any effect on the estate being administered in bankruptcy.*”
10 *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting *Pacor, Inc. v. Higgins*, 743
11 F.2d 984, 994 (3rd Cir. 1984) (emphasis in original)). Upon the filing of the
12 Complaint, this Court had related to jurisdiction over the Complaint. However, the
13 Answer raises claims that arise in the Bankruptcy Case, including Perkins’ asserted
14 claims against the estate and its allegation of mismanagement of the estate’s
15 resources by the Trustee. Therefore, the adversary proceeding is core.

16 Pursuant to 28 U.S.C. § 157(a), the United States District Court for the
17 Eastern District of Washington has referred all bankruptcy cases filed in the district

18 [This Opposition continues on the next page.]
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1 to the Bankruptcy Court. *See* LCivR 83.5(a). However, 28 U.S.C. § 157(d)
2 provides:

3 The district court may withdraw, in whole or in part, any case or
4 proceeding referred under this section, on its own motion or on timely
5 motion of any party, *for cause shown*. . . .

6 28 U.S.C. § 157(d). (Emphasis added.) Perkins Coie, as movant, bears the burden
7 of establishing cause. *Budsberg v. Spice*, 2017 WL 3895701, at *2 (Bankr. W.D.
8 Wash. 2017). *See also In re Pruitt*, 910 F.2d 1160, 1168 (3rd Cir. 1990) (“[T]he
9 statute requires in clear terms that cause be shown before the reference can be
10 withdrawn.”). The withdrawal statute is narrowly construed, so as not to provide
11 an “escape hatch” from the bankruptcy court. *In re CIS Corp.*, 188 B.R. 873, 877
(S.D.N.Y. 1995).

12 In determining whether cause exists to withdraw the reference, courts
13 consider a variety of factors, including “the efficient use of judicial resources,
14 delay and costs to the parties, uniformity of bankruptcy administration, the
15 prevention of forum shopping, and other related factors.” *Security Farms v. Int’l*
16 *Bhd. of Teamsters, Chauffers, Warehousemen, & Helpers*, 124 F.3d 999, 1008 (9th
17 Cir. 1997) (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2nd Cir. 1993)).

18 **A. The Trustee’s Claims Are Not Subject to the Seventh Amendment**

19 Perkins Coie argues that it is entitled to a jury trial and that this right
20 establishes cause to withdraw the reference. Federal law determines whether a
21 party is entitled to a jury trial, regardless of whether the cause of action is created
22

1 by state or federal law. *Simler v. Conner*, 372 U.S. 221, 222, 83 S.Ct. 609, 9
2 L.Ed.2d 691 (1963). The leading case on the question is *Granfinanciera S.A. v.*
3 *Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), where the
4 Supreme Court held:

5 The Seventh Amendment provides: “In Suits at common law, where
6 the value in controversy shall exceed twenty dollars, the right of trial
7 by jury shall be preserved” We have consistently interpreted the
8 phrase “Suits at common law” to refer to “suits in which legal rights
9 were to be ascertained and determined, in contradistinction to those
10 *where equitable rights alone were recognized, and equitable remedies*
11 *were administered.*” *Parsons v. Bedford*, 3 Pet. 433, 447, 7 L.Ed. 732
12 (1830). Although “the thrust of the Amendment was to preserve the
13 right to jury trial as it existed in 1791,” the Seventh Amendment also
14 applies to actions brought to enforce statutory rights that are
15 analogous to common-law causes of action ordinarily decided in
16 English law courts in the late 18th century, as opposed to those
17 customarily heard by courts of equity or admiralty. *Curtis v.*
18 *Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974).

19 The form of our analysis is familiar. “First, we compare the statutory
20 action to 18th-century actions brought in the courts of England prior
21 to the merger of the courts of law and equity. Second, we examine the
22 remedy sought and determine whether it is legal or equitable in
23 nature.” *Tull v. United States*, 481 U.S. 412, 417–418, 107 S.Ct. 1831,
24 95 L.Ed.2d 365 (1987) (citations omitted). The second stage of this
25 analysis is more important than the first. *Id.*, at 421.

26 *Granfinanciera*, 492 U.S. at 40–42. (Emphasis added.) Perkins Coie, which bears
27 the burden of proof on withdrawal, has not cited any case to the effect that an
28 action of this sort could have been brought at law in England in 1791.

29 Indeed, both the action and the remedy for breach of fiduciary duty arising
30 from a trust were equitable matters in 1791 England. The Supreme Court has

1 recognized that an action by a trust beneficiary against a trustee for breach of
2 fiduciary duty was historically within the exclusive jurisdiction of courts of equity,
3 sitting without juries. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*,
4 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), citing 2 J. Story,
5 Commentaries on Equity Jurisprudence § 960 (13th ed 1886).

6 The Supreme Court in *Terry* noted that damages awarded to beneficiaries for
7 a trustee's breach of trust “were available only in courts of equity because those
8 courts had exclusive jurisdiction over actions involving a trustee's breach of his
9 fiduciary duties.” *Id.*, 494 U.S. at 571 n. 8, 110 S.Ct. 1339. *See also Third*
10 *Restatement of Trusts* § 95 cmt. b (“If a breach of trust causes a loss, including any
11 failure to realize income, capital gain, or appreciation that would have resulted
12 from proper administration, the beneficiaries are entitled to restitution and may
13 have the trustee surcharged for the amount necessary to compensate fully for the
14 consequences of the breach.”); Bogert & Bogert, *The Law of Trusts and Trustees* §
15 862 (“For a breach of trust the trustee may be directed by the court to pay damages
16 to the beneficiary out of the trustee's own funds, either in a suit brought for that
17 purpose or on an accounting where the trustee is surcharged beyond the amount of
18 his admitted liability.”).

19 These observations should come as no surprise. Trusts were within the
20 exclusive province of the courts of equity because courts of law refused to
21 recognize them at all. *SEC v. Cavanagh*, 445 F.3d 105, 118–19 (2nd Cir. 2006)

1 (citing 3 William Blackstone, *Commentaries on the Laws of England* 431 (photo.
2 reprint 1992) (1768)); *Cavanaugh*, at 119 n. 31(citing Stewart E. Sterk, *Asset*
3 *Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L.Rev. 1035,
4 1040–42 (2000)).

5 Under these authorities, Perkins Coie has no right to a jury trial on the
6 Trustee's claims.

7 **B. Perkins Coie Has Submitted to the Bankruptcy Court's Equitable**
8 **Jurisdiction**

9 In *Langenkamp v. Culp*, 498 U.S. 42 (1990), the U.S. Supreme Court held
10 that creditors who file claims against the bankruptcy estate have no Seventh
11 Amendment right to a jury trial because, by filing a claim, the creditors submit
12 themselves to the equitable jurisdiction of the bankruptcy court. *Id.* at 45. *Cf. Tanzi*
13 *v. Shulkin*, 2006 WL 2927660, at *3 (Bankr. W.D. Wash., 2006) (debtor who files
14 bankruptcy waives jury trial). In *In re Commercial Fin. Services Inc. v. Jones (In*
15 *re Commercial Fin. Services, Inc.)*, 251 B.R. 397 (Bankr. N.D. Okla. 2000), the
16 court denied a motion to withdraw the reference where defendant filed an answer
17 to the debtor's complaint with an affirmative defense asserting that the defendant
18 "may be owed money by [plaintiff] which may be set-off or recouped against any
19 amount that he may owe to [plaintiff]." *Id.* The court in *Commercial Fin. Services*
20 held that "the assertion of setoff, whether as a defense or as a counterclaim, clearly

1 invokes the claims allowance process.” *Id.*, 251 B.R. at 406. The claims allowance
2 process is core. 28 U.S.C. § 157(b)(2)(B).

3 In its late-filed Answer, Perkins Coie asserts claims against the estate.
4 Namely, it seeks to recover from the estate “*any and all damages* incurred by
5 Perkins as a result of following the instructions of Giga Watt. Pte. Ltd.” Answer, p.
6 14, ¶ 2, lines 20-21. (Emphasis added.) This is a claim for relief against the
7 bankruptcy estate even though Perkins Coie characterizes it as a mere defense. In
8 *Commercial Fin. Services*, the Court rejected the defendant's argument that by
9 asserting setoff as a defense, it was not actually seeking to recover from the estate
10 but merely seeking to reduce the amount it would have to pay to the estate:

11 This Court fails to see a distinction between obtaining something of
12 value from the estate by filing a claim and obtaining something of
13 value from the estate, i.e., discharge of all or a portion of a debt to
[the debtor] by asserting setoff as a defense. In both cases, the estate
may be diminished and [the creditor] may be enriched.
14 *Id.*, 251 B.R. at 407. See also *In re Automotive Professionals, Inc.*, 389 B.R. 621,
15 629–30 (Bankr. N.D. Ill., 2008) (Courts “look past the technical title of a defense .
16 . . and instead focus on the actual substance of the pleading to determine whether it
17 is a claim against the bankruptcy estate.”); *Container Recycling Alliance v.*
18 *Lassman*, 359 B.R. 358, 365 (Bankr. D. Mass. 2007) (“[r]egardless of the disguise
19 under which a claim is asserted . . . , the Court must look to the substance of the
20 assertion to determine whether the claims allowance process has been invoked.”)
21 (citations omitted). This approach is consistent with Rule 8(c) of the Federal Rules
22

1 of Civil Procedure, made applicable to this case by Rule 7008 of the Federal Rules
2 of Bankruptcy Procedure. Rule 8(c)(2) states, “If a party mistakenly designates a
3 defense as a counterclaim, or a counterclaim as a defense, the court must, if justice
4 requires, treat the pleading as though it were correctly designated, and may impose
5 terms for doing so.” F.R.C.P. 8(c)(2).

6 Under the foregoing authorities and facts, by seeking “any and all damages”
7 from the estate, Perkins Coie has triggered the claims allowance process, submitted
8 to the equitable jurisdiction of this court, and waived the right to a jury trial. The
9 claims allowance process is core. 28 U.S.C. § 157(b)(2)(B).

10 **C. Any Right to a Jury Trial Would Not Trigger Automatic Withdrawal**

11 Even if Perkins Coie had a right to a jury trial, which it does not, that right
12 would not require automatic withdrawal of the reference. *See In re*
13 *Healthcentral.com*, 504 F.3d 775, 778 (9th Cir. 2007) (“A valid right to a Seventh
14 Amendment jury trial in the district court does not mean . . . that the action must be
15 transferred to the district court. Instead, we hold, the bankruptcy court may retain
16 jurisdiction over the action for pre-trial matters.”). *See also In re Washington*
17 *Manufacturing Co.*, 133 B.R. 113, 119 (Bankr. M.D. Tenn. 1991) (Motion to
18 withdraw reference is premature when the bankruptcy court is thoroughly familiar
19 with the case and the issues triable by jury are not ready for trial.). Indeed, district
20 courts “allow[] the bankruptcy court to retain jurisdiction over the action until trial
21 is actually ready.” *Healthcentral.com*, 504 F.3d at *9. *Accord Veys v. Riske*, 2007

1 WL 4246172, at *3 (W.D. Wash., 2007). *See also In re Dwek*, 2010 WL 2545174,
2 at *4 (D. N.J., 2010) (“[T]he Court rejects Defendants' argument that a jury
3 demand is ‘automatic cause’ to withdraw the reference.”).

4 **D. Under the Circumstances, There Is No Cause to Withdraw the**
5 **Reference**

6 This case is in its earliest stages. Perkins Coie treated the Rule 26(f)
7 Conference as optional, demurred when asked to discuss its defenses and
8 discovery plan, and ignored the response deadline. Further, the Answer, filed the
9 evening before this Opposition was due, raises potentially dispositive defenses of
10 failure to state a claim and lack of standing. These legal defenses would, if
11 successful, avoid any trial.

12 Perkins Coie’s lack-of-standing defense also illustrates how the Bankruptcy
13 Court is better suited to resolve this proceeding. The defense implies that the
14 Trustee’s claims against Perkins Coie belong to the token holders. A trustee’s
15 standing raises complex bankruptcy issues. *Compare, Ahcom, Ltd. v. Smeding*, 623
16 F.3d 1248 (9th Cir. 2010) (trustee lacks standing to pierce the debtor’s corporate
17 veil) *with Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339
18 (7th Cir. 1987) (trustee has standing to pierce the debtor’s corporate veil).

19 In this case, the escrow misappropriation directly damaged Giga Watt by
20 hollowing out the escrow on which Giga Watt relied. The escrow was supposed to
21 be Giga Watt’s back stop in the event – as happened – that Giga Watt failed to

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1 build out sufficient facilities to service all the tokens that GW Singapore was
2 selling. The Bankruptcy Court is much better suited than another court to navigate
3 and resolve these issues.

4 The Bankruptcy Court is also more familiar than any other forum with the
5 circumstances described in the Complaint and partially admitted in the Answer.
6 The Bankruptcy Court understands Giga Watt's business – given that the Trustee
7 ran two of the debtor's facilities with the Bankruptcy Court's approval. The
8 Bankruptcy Court has been briefed regarding the ICO and the tokens holders'
9 claims – all of which are integral to the suit against Perkins Coie. This Court's
10 familiarity with the facts, context, and issues makes it more efficient for this Court
11 to keep the case. *See In re Canter*, 299 F.3d 1150, 1154 (9th Cir., 2002) (citing the
12 bankruptcy court's greater familiarity with the facts in reversing district court's
13 withdrawal of reference).

14 1. *The TH Class Action Should Be Referred to the Bankruptcy Court*

15 The plaintiffs in the TH Class Action are going to move to refer the TH
16 Class Action to the Bankruptcy Court because the issues overlap substantially with
17 those raised in this adversary proceeding. In particular, the TH Class Action raises
18 the core issues of which token holders' claims are derivative of Giga Watt (i.e., the
19 token holder suffered damages when Giga Watt collapsed as a result of Perkins
20 Coie's failure to act as an escrow) or direct (i.e., the token holder's money and
21 tokens were released before Giga Watt had the power). This in turn raises the core
22

1 issue of the automatic stay. To the extent a token holders' claim is derivative, it
2 belongs to the estate. Any judgment on that claim would be void as violating the
3 automatic stay provisions of section 362 of the Bankruptcy Code. Those issues
4 should be decided by the Bankruptcy Court.

5 If the TH Class Action is not referred, then the District Court may find itself
6 referring significant issues, such as standing, property of the estate, and the
7 automatic stay, to the Bankruptcy Court. Thus, issues throughout the case would
8 be litigated in piece meal with neither the Bankruptcy Court nor the District Court
9 having the full picture or worse requiring both courts to immerse themselves in this
10 proceeding throughout its duration.

11 III. CONCLUSION

12 Wherefore, the Trustee respectfully request that the Court:

- 13 1. Deny the Motion in its entirety; and
- 14 2. Grant such other and further relief as the Court deems necessary and
15 just.

16 Dated: January 14, 2021

POTOMAC LAW GROUP PLLC

17
18 By: /s/ Pamela M. Egan
19 Pamela M. Egan (WSBA No. 54736)
20 *Attorneys for Mark D. Waldron, Chapter 7*
21 *Trustee, Plaintiff*